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Supreme Court of the United States

October Term, 1943

No. 649

BARGE "ANACONDA" AND SMITH-ROWLAND COMPANY, INC.
Petitioners

against

AMERICAN SUGAR REFINING COMPANY,
Respondent

Petition for Writ of Certiorari to the United States Circuit Court of Appeals of the Fifth Circuit and Brief in Support Thereof.

Cody Fowler
Seybold Bldg.
Miami, Fla.
Proctor for Petitioners

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CASES AND STATUTES CITED

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BARGE "ANACONDA" AND SMITH-ROWLAND COMPANY, INC.
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AMERICAN SUGAR REFINING COMPANY,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Barge "Anaconda" and Smith-Rowland Company, Inc. respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals of the Fifth Circuit to review the decision and judgment of said Court rendered November 9, 1943 (R. 48-52), reversing the judgment of the United States District Court for the Southern District of Florida, Miami Division. (Findings of fact and Conclusions of Law, R. 25-30; Judgment R. 30-31; Reported in 48 Fed. Supp. 385).

I

Summary Statement of the Matter Involved

The American Sugar Refining Company filed its libel in rem against the Barge "Anaconda" and in personam against Smith-Rowland Company, Inc., its owners for an alleged breach of charter-party. (R. 2-6). In due course the barge was seized under process in rem and as Smith-Rowland Company's property under foreign attachment in the suit in personam. (R. 21-22).

Smith-Rowland Company, Inc. appeared specially and excepted to the jurisdiction of the Court on the grounds: that the contract of charter-party on which the libel was based contained a provision for arbitration pursuant to the United States Arbitration Act, Title 9 U. S. C. A.; and that the parties, having provided that "the provisions of Section 8 of the Act shall not apply to any arbitration hereunder," thereby agreed that the benefits of Section 8 should not be available to the parties; that Section 8 being the sole basis for the filing of the libel and the issuance of the attachment thereunder, in view of the adoption by the parties of the Arbitration Act, the elimination of Section 8 from their agreement left no basis for invoking the jurisdiction of the Court by this procedure. (R. 10-12).

The District Court treated the special appearance and exceptions as a motion to dismiss and ordered the release of the barge from attachment on the ground that the libel was not properly filed because of the agreement of the parties contained in Paragraph Fifteen of the charter-party. (R. 30-31).

The opinion and judgment of the Circuit Court of Appeals reversed the Trial Court on the ground that the

agreement of the parties as construed by the Trial Court was against public policy as an attempt to oust the Court of part of its jurisdiction. (R. 48-52).

II

Basis of Jurisdiction

Jurisdiction of this Court is asserted under Section 240a of the Judicial Code, as amended. (U.S.C.A., Title 28, Section 347a.).

The opinion of the Circuit Court of Appeals was rendered on the 9th day of November, 1943. (R. 48).

III

Questions Presented

1. What did the parties mean by Paragraph Fifteen of their contract in adopting the United States Arbitration Act, U. S. C. A., Title 9, but providing that Section 8 thereof should not apply to any arbitration thereunder? (Paragraph Fifteen, R. 36).

2. Is an agreement in a war-time charter-party for arbitration of disputes thereunder pursuant to the United States Arbitration Act invalid as against public policy because it provides that pending and in the course of such arbitration the vessel which is subject of the charter-party shall not be libeled or seized under process of attachment?

IV

Reasons Relied Upon for Allowance of the Writ

1. The Circuit Court of Appeals has decided an important question of Federal Law, which has not been,

but should be settled by this Court. It is submitted that this case presents a question involving the efficacy of an emergency provision in the War Shipping Administration form of charter-party, a decision upon which will affect all such charter-parties now in force and the operation of all war-time shipping.

2. The decision rendered is of such nature as to call for the exercise of this Court's power of supervision i norder to prevent serious hindrance in the administration of the present war in that the effect of the decision is that parties, when entering a contract for arbitration, will not be able to agree effectively that they will not, if a controversy arises, attach a ship or barge and take it out of service.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari do issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals of the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a transcript of the record and proceedings herein, and that the judgment herein of the said Circuit Court of Appeals of the Fifth Circuit, be reversed by this Honorable Court and your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

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Proctor for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. .....

BARGE "ANACONDA" AND
SMITH-ROWLAND COMPANY, INC.,
PETITIONERS,
against
AMERICAN SUGAR REFINING COMPANY
RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

It is our contention that the Circuit Court of Appeals erred in reversing the judgment of the District Court on the ground that Paragraph 15 of the charter-party, as interpreted by the Trial Court, was invalid as against public policy in that it had a tendency to oust the Court of jurisdiction, and that the Circuit Court of Appeals further erred in giving a different construction from that given by the District Court to this paragraph of the charter-party.

I

By adopting the United States Arbitration Act in paragraph 15 of their charter-party but providing that Section 8 thereof should not appl to any arbitration thereunder, the parties intended to agree that in the course of any arbitration the vessel which is the subject of the charter-party should not be libeled or seized under process of attachment.

Section 8 of the Arbitration Act preserves to an aggrieved party certain benefits provided by Admiralty

practice that would not normally be contemplated by parties in entering a binding and irrevocable agreement to arbitrate such as is provided by the Arbitration Act.

Section 8 provides:

> "If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be agrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

This Honorable Court, speaking through Mr. Chief Justice Hughes, has interpreted this section as follows:

> "The intent of Section 8 to provide for enforcement of the agreement for arbitration without depriving the aggrieved party of his right under the admiralty practice to proceed against the 'vessel or other property' belonging to the other party to the agreement."

Marine Transit Corp. vs. *Dreyfus,* 1932, 284, U. S., 263 (at page 275): 52 S. Ct. 166: 76 L. Ed. 282.

A further amplification of this interpretation may be found in two opinions of the United States District Court for the Southern District of New York, speaking through Judge Patterson:

> "The purpose and intent of Section 8, 9 U. S. C. A., Sec. 8 is to allow an aggrieved party the benefit of security obtained by attachment; to achieve this end the arbitration is made a phase of the suit in admiralty."

The Sydfold, 25 Fed. Supp. 662 (at page 663)

> "Under this Section libel and seizure of a vessel or other property may be the initial step in a proceeding to enforce an agreement for arbitration."
>
> The Belize, 25 Fed. Supp. 663 (at page 665).

It is therefore clear, as well from the wording of Section 8 as from the judicial interpretations thereof, that the benefit it seeks to provide, or preserve, is the benefit of the security obtained from libel and attachment of a vessel. It was this benefit, then, that the parties agreed to forego in regard to any arbitration that might be called for under Paragraph 15 of their charter-party.

There was a definite reason for the parties making such a contract. This was a War Shipping Administration form of charter-party (R. 35-36) prepared by an agency of the government to serve its needs in a time of war. Because of the scarcity of shipping and the policy of the government to keep as many vessels in service as possible, it was thought expedient to provide in such charter-party that in the event differences arose making it necessary for the parties to resort to arbitration the vessel, or barge in this case, should not face seizure and attachment, as is allowed under Section 8 of the 1925 Arbitration Act, U. S. C. A., Title 9, pending settlement of such differences by arbitration—at least not until there was a final award of arbitration which must be enforced through the processes of the Courts.

II

An agreement in a war-time charter-party for arbitration of disputes thereunder pursuant to the United States Arbitration Act is not invalid as against public policy because it provides that pending and in the course of such arbitration the vessel which is subject of the charter-party shall not be libeled or seized under process of attachment.

It is a policy of the United States, as established by Congressional action, to recognize as valid, irrevocable and enforceable, executory agreements to arbitrate, and in establishing such policy, Congress rejected the outmoded theory that such agreements tended to "oust courts of their jurisdiction".

The history and developments of this statutory policy is traced by Justice Frank of the Circuit Court of Appeals for the Second Circuit in the case of *Kulukundis Shipping Co.* vs. *Amtorg Trading Corp.*, 126 F. (2d) 978. At page 983 of this opinion, the Court said, speaking of agreements to arbitrate:

> " . . . . it became fashionable in the middle of the Eighteenth Century to say that such agreements were against public policy because they 'oust the jurisdiction' of the courts. But that was a quaint explanation inasmuch as an award, under an arbitration agreement, enforced both at law and in equity, was no less an ouster: and the same was true of releases and covenants not to sue, which were given full effect."

The Court continued on page 985:

> "The United States Arbitration Act of 1925 was sustained as constitutional in its application to cases arising in admiralty. *Marine Transit Corp.* v. *Dreyfus*, 1932, 284 U. S. 263, 52 S. Ct. 166, 76 L. Ed. 516. The purpose of that Act was deliberately to alter the judicial atmosphere previously existing. The report of the House Committee stated, in part: 'Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An Arbitration agreement is placed upon the same footing as other contracts, where it belongs. * * * The need for the law arises from an anachronism of our American Law. Some Centuries ago, because of the

jealousy of the English Courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American Courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal Courts for their enforcement. * * * It is particularly appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable."

"In the light of the clear intention of Congress, it is our obligation to shake off the old judicial hostility to arbitration. Accordingly, in a case like this, involving the Federal Act, we should not follow English or other decisions which have narrowly construed the terms of arbitration agreements or arbitration statutes."

From this interpretation and from the Act itself, we must conclude that it is now a public policy in this country to enforce executory agreements to arbitrate according to their terms. It cannot be said, in consonance with this broad policy, that if one of the terms be that seizure and attachment of a vessel will not be sought pending the arbitration, such term is invalid and un-enforceable.

Petitioners have not repudiated their agreement to arbitrate, and there is no provocation for respondent seeking the aid of the Court's processes at this point to

secure the enforcement of such agreement. If an award had been obtained or the agreement had been repudiated by petitioners, perhaps libel and attachment of the barge would have been in order; but if respondent is permitted to use the processes of the Court now, to seize and attach the barge, it will be doing violence to the spirit and purpose of the Arbitration Act as well as to establish principles of equity, by enlisting the aid of the Court to circumvent a valid contract, a contract not to seize and attach the barge pending or in the course of arbitration proceedings.

CONCLUSION

Recognizing the principle that Courts will not construe an arbitration agreement as ousting them of their jurisdiction unless such construction is inevitable (*American Guaranty Company* v. *Caldwell*, 72 F. 2d 209) and holding that a contract which ousted the jurisdiction of a Court of admiralty to the extent that it prevented the filing of a libel in rem would be invalid, the Circuit Court of Appeals proceeded to give a strained and artificial construction to the contract of the parties here, in order to avoid holding that contract invalid.

Under the same principle the Circuit Court of Appeals could have found that the contract was valid by giving it a construction that would have been in harmony with the obvious intention of the parties in contracting as they did under existing circumstances. It could have found that the parties did not intend to oust the Court of its in rem jurisdiction, but that they merely intended to provide that the in rem process of the Court should not be available pending and during the course of the non-judicial proceeding, referred to as arbitration.

We respectfully submit for the reasons stated in the petition and this brief, that the application for writ of certiorari should be granted.

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